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PROPNEX REALTY SDN BHD v. SMALL MEDIUM ENTERPRISE DEVELOPMENT BANK MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
SUZANA MUHAMAD SAID JC
[APPEAL NO: WA-12BNCVC-25-02-2023]
B 31 JULY 2023

Abstract – *If the real property agent's services are the effective cause of a sale and purchase transaction, and it has succeeded in proving that some of its acts are the causa causans of the said transaction, it is entitled to the payment for the services rendered based on 'quantum meruit' (what he deserves), even if there is no express contract that dealt with its purported entitlement to commission.*

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CONTRACT: *Breach – Claim for services rendered – Non-payment of professional fees to real estate agency – Whether there was valid contract of appointment of real property agent – Whether agent entitled to professional fee – Whether agent effective cause of sale of property – Whether act of agent causa causans of transaction – Whether agent entitled to payment based on quantum meruit*

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This was an appeal by a registered real estate agency ('appellant') against the decision of the Sessions Court that dismissed their actions with costs. The appellant's claim against the respondent was for the sum of RM868,140 being the appellant's professional fees as a real property agent for the sale of the respondent's property ('property'). It was contended by the appellant that they had provided the information regarding the property and had conveyed it to the potential buyers: George Kent (Malaysia) Berhad ('GKB') and/or Dynacare Sdn Bhd ('Dynacare') through exchanges of WhatsApp messages, emails and/or meetings and/or site visits between 9 October 2020 to 11 January 2021. It was also contended by the appellant that between 13 January 2021 and 18 January 2021, meetings and/or site visits were held among the representatives of the appellant, the respondent and the potential buyer to assess and/or examine the condition of the property before making a final decision regarding the purchase of the property. On or around January 2021, after a site visit on 16 January 2021, the respondent met the potential buyer for discussions regarding the property but the appellant was not allowed to participate. In spite of this, during the period between 20 January 2021 to 22 March 2021, the respondent continued furnishing feedback to the appellant upon inquiries. The respondent also noted the role of the appellant as an 'introducer' for the property. Therefore, after communicating with SD1, the appellant sent an invoice to the respondent for payment amounting to RM868,140. However, the respondent refused to pay the appellant by alleging that there was no formal agreement between them concerning the appellant's appointment. The issues that arose were (i) whether there was a

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valid contract of appointment of the appellant as a real property agent for the respondent, which thereby entitled the appellant for a professional fee; and (ii) whether the appellant was the effective cause of the sale of the property.

Held (allowing appeal in part):

(1) Rule 92(1) of the Valuers, Appraisers and Estate Agents Rules 1986 ('VAEAR') under the Valuers, Appraisers and Estate Agents Act 1981 specifically required the appellant who was, undisputedly, a registered estate agent, must ensure that all financial obligations and commitments regarding real estate transactions are to be reduced into writing reflecting the exact agreement of the parties and a copy of such an agreement must be furnished to each party upon the signing of the agreement. Based on the letter of intent ('LOI'), it was stated that the respondent was given until 10 February 2021 to accept the offer. Otherwise, the LOI shall automatically lapse and become null and void as expressly stated therein. However, the LOI was never accepted and signed by the respondent. As such, in the absence of a duly executed LOI, the respondent could not be made liable to pay the fees as claimed by the appellant. The LOI had lapsed, effectively expired and became automatically null and void when there was no response or acceptance of the purchase offer from the respondent to GKB. Obviously, there was no contract in writing as required under r. 92(1) of the VAEAR. (paras 10-17)

(2) The appellant must show that some act of the appellant was the *causa causans* of the transaction or was an effective cause of the sale. This meant that the appellant's efforts to market the property must have operated to produce a ready and willing buyer for the property. The appellant had shown sufficient connection between their conduct and the ultimate sale transaction: (i) the respondent had attended the meetings proposed and/or arranged by the appellant to 'connect' the respondent and the potential buyer pertaining to the sale of the property; (ii) after a site visit on 16 January 2021, the respondent met with the potential buyer for discussion regarding the property (although the appellant was not allowed to participate in the discussion); (iii) although the appellant requested in vain to attend the meeting on 18 January 2021 for further discussion on the sale of the property with the potential buyer, the respondent continued to provide feedback between 20 January 2021 to 22 March 2021 when the appellant made follow up inquiries on the status of the sale of the property. The purchase of the property was finalised through the sale and purchase agreement to Dynacare for RM27,300,000. There was therefore a sufficient connection between the appellant's conduct and the ultimate sale transaction. There was also a continuation within a close proximity of time, *ie,* from the moment when the potential buyer was brought by the appellant to the

respondent, until the day when an offer was made to purchase the property which subsequently culminated in the successful sale of the property. The appellant had thus succeeded in proving that some act of the appellant was the *causa causans* of the transaction and that their efforts had been the effective cause of the sale. Accordingly, the appellant was the effective cause in bringing about the sale of the property. (paras 23-32)

(3) There was no express contract that dealt with the appellant's purported entitlement to commission. However, as the appellant's services were the effective cause of the transaction, the appellant was entitled to the payment of the services rendered based on '*quantum meruit*' (what he deserves). As such, a sum that would provide the appellant with the value of what the appellant had done for the respondent would be appropriate and this is usually calculated by reference to the value of the services. (paras 34-36)

Case(s) referred to:

Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v. Dae Hanguru Infra Sdn Bhd & Another Appeal [2020] 5 CLJ 27 CA ***(refd)***

Chew Teng Cheong & Anor v. Pang Choon Kong [1983] 2 CLJ 117; [1983] CLJ (Rep) 86 FC ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***

Miller v. Radford [1903] 19 TLR 575 ***(refd)***

Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors [2020] 10 CLJ 1 FC ***(refd)***

Singham Sulaiman Sdn Bhd v. Mega Palm Sdn Bhd [2013] 1 LNS 569 HC ***(refd)***

Sushames v. Cumming [1962] NZLR 920 ***(refd)***

Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd [2009] 1 CLJ 786 CA ***(refd)***

Tribe v. Taylor [1876] 1 CPD ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71

Valuers, Appraisers and Estate Agents Rules 1986, rr. 92(1), 110(1)

For the appellant - M/s PW Tan & Assocs
For the respondent - M/s Amelda Fuad Abi & Aidil

Reported by Suhainah Wahiduddin

JUDGMENT

Suzana Muhamad Said JC:

Introduction

[1] This is an appeal by a registered real estate agency, Propnex Realty Sdn Bhd (appellant) against the decision of the Sessions Court that dismissed their actions with cost.

[2] For ease of reference, the respective parties shall be referred to as appellant and respondent.

Case Background

[3] The appellant's claim against the respondent is for the sum of RM868,140 being the appellant's professional fees as a real property agent for the sale of the respondent's property situated at Lot No. 1558, Jalan Pelabuhan 3 Lumut Industrial Park, Kampung Acheh, 32000 Sitiawan, Perak ("the property").

[4] It was contended by the appellant that they had provided the information regarding the property and had conveyed it to the potential buyers: George Kent (Malaysia) Berhad (GKB) and/or Dynacare Sdn Bhd (Dynacare) through exchanges of WhatsApp messages, emails, and/or meetings and/or site visits between 9 October 2020 to 11 January 2021.

[5] It was also contended by the appellant that between 13 January 2021 and 18 January 2021, meetings and/or site visits were held among the representatives of the appellant, the respondent, and the potential buyer to assess and/or examine the condition of the property before making a final decision regarding the purchase of the property.

[6] At the material times, the representatives of the respondent were Khairil Anuar b. Mohammad Anuar (Khairil), Mohd Razali Malek (Razali/SD1), and Azzihha Azura Abdul Aziz (Azzihha/SSD1), while the representatives of the appellant were Bryan Yeo King Yong (Bryan/SP1) and Danny Gan Eng Kiat (Danny/SP2).

[7] On or around January 2021, after a site visit on 16 January 2021, the respondent met the potential buyer for discussions regarding the property but the appellant was not allowed to participate. In spite of this, during the period between 20 January 2021 to 22 March 2021, the rpespondent continued furnishing feedback to the appellant upon inquiries. The respondent also noted the role of the appellant as an "introducer" for the property.

[8] Therefore, on 8 June 2021, after communicating with Razali (SD1), the appellant sent an invoice no. IX210600042 dated 2 June 2021 (invoice) to the respondent for payment amounting to RM868,140. However, *vide* a letter dated 16 June 2021, the respondent refused to pay the appellant by alleging that there is no formal agreement between them concerning the appellant's appointment.

The Issues

[9] The court finds that there are two substantial issues that revolve around this appeal:

A (i) whether there was a valid contract of appointment of the appellant as a real property agent for the respondent, which thereby entitled the appellant for a professional fee?

(ii) whether the appellant is the effective cause of the sale of the property?

B **Analysis And Findings Of The Court**

(i) Whether There Was A Valid Contract Of Appointment Of The Appellant As A Real Property Agent For The Respondent, Thus Entitled The Appellant For A Professional Fee?

C Requirement Of r. 92(1) Of The Valuers, Appraisers And Estate Agents Rules 1986

[10] Rule 92(1) of the Valuers, Appraisers and Estate Agents Rules 1986 (VAEAR) under the Valuers, Appraisers and Estate Agents Act 1981 (Act 242). Rule 92(1) provides:

D > *A registered estate agent shall,* for the protection of all parties, *see that financial obligations and commitments regarding real estate transactions are in writing* expressing the exact agreement of the parties and *a copy of each such agreement shall be furnished to each party upon signing such agreement.*
>
> (emphasis added)

E **[11]** Rule 110(1) of VAEAR also provides that "Every registered estate agent shall at all times faithfully observe and perform all his obligations under the Valuers, Appraisers and Estate Agents Act 1981 and any Rules made thereunder."

[12] It is clear that r. 92(1) specifically required the appellant who is,
F undisputedly, a registered estate agent, must ensure that all financial obligations and commitments regarding real estate transactions are to be reduced into writing reflecting the exact agreement of the parties and a copy of such an agreement must be furnished to each party upon the signing of the agreement.

G **[13]** The appellant contended that there was a contract of appointment of the appellant as a real property agent for the respondent by relying on the letter of intent (LOI) dated 11 January 2021. The respondent denied the said LOI. For completeness, the LOI is reproduced:

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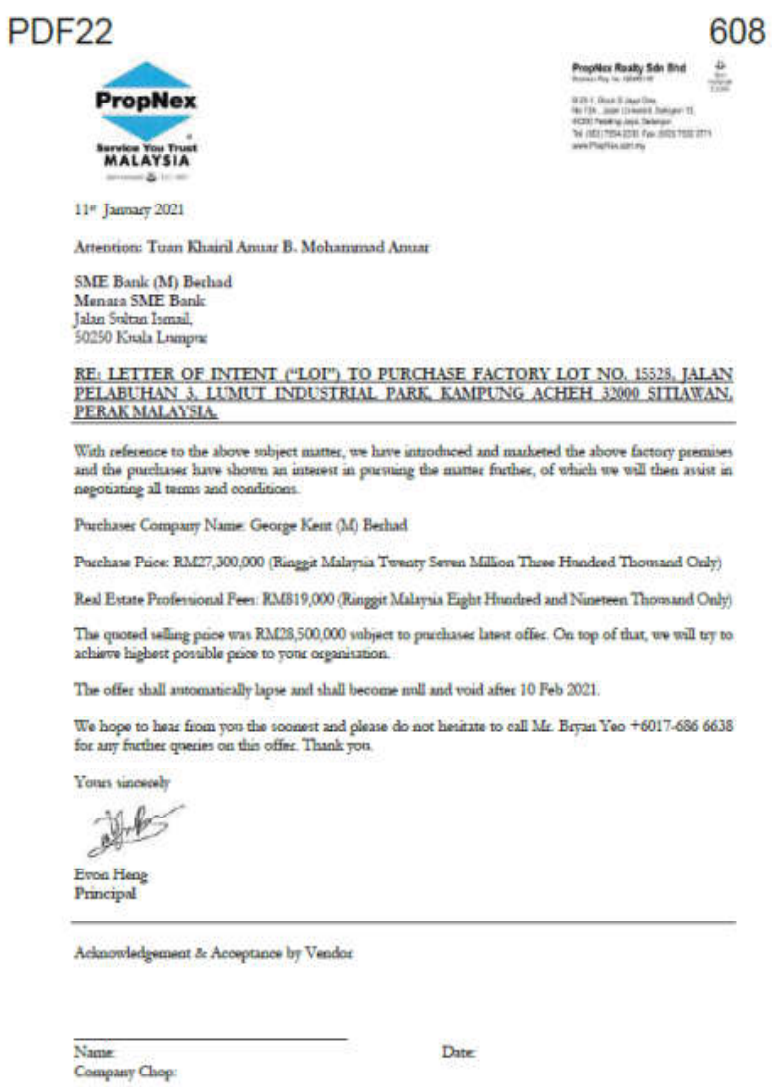

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PropNex Realty Sdn Bhd

PropNex
Service You Trust
MALAYSIA

11th January 2021

Attention: Tuan Khairil Anuar B. Mohammad Anuar

SME Bank (M) Berhad
Menara SME Bank
Jalan Sultan Ismail,
50250 Kuala Lumpur

RE: LETTER OF INTENT ("LOI") TO PURCHASE FACTORY LOT NO. 15528, JALAN PELABUHAN 3, LUMUT INDUSTRIAL PARK, KAMPUNG ACHEH 32000 SITIAWAN, PERAK MALAYSIA.

With reference to the above subject matter, we have introduced and marketed the above factory premises and the purchaser have shown an interest in pursuing the matter further, of which we will then assist in negotiating all terms and conditions.

Purchaser Company Name: George Kent (M) Berhad

Purchase Price: RM27,300,000 (Ringgit Malaysia Twenty Seven Million Three Hundred Thousand Only)

Real Estate Professional Fees: RM819,000 (Ringgit Malaysia Eight Hundred and Nineteen Thousand Only)

The quoted selling price was RM28,500,000 subject to purchaser latest offer. On top of that, we will try to achieve highest possible price to your organization.

The offer shall automatically lapse and shall become null and void after 10 Feb 2021.

We hope to hear from you the soonest and please do not hesitate to call Mr. Bryan Yeo +6017-686 6638 for any further queries on this offer. Thank you.

Yours sincerely

Evon Heng
Principal

Acknowledgement & Acceptance by Vendor

Name:
Company Chop:

Date:

[14] Based on the LOI, it was stated that the respondent was given until 10 February 2021 to accept the offer. Otherwise, the LOI shall automatically lapse and become null and void as expressly stated in the LOI. However, the LOI was never accepted and signed by the respondent. Furthermore, the purchaser's company mentioned in the LOI was GKB.

[15] The respondent hence denied that they had appointed the appellant as the real property agent for the sale of the property. Instead, the respondent contended that the appellant was merely offered as an "introducer" which entitled them to be paid with a certain fee. Nonetheless, the matter concerning the appellant as "an introducer" was never finalised because the

'introducer's registration form' and 'buyer's registration form' which were submitted by the appellant were incomplete, in the sense that it was not signed as required.

[16] Further, the respondent in its defence argued, *inter alia*, that there is neither *consensus ad idem* on any offer/appointment as alleged by the appellant, nor by conduct or by representation which effectively gives rise to an appointment of the appellant as the property agent of the respondent for the sale of the property.

[17] As such, in the absence of a duly executed LOI, the respondent cannot be made liable to pay the fees as claimed by the appellant. In this regard, the court agrees that the LOI had lapsed, effectively expired and became automatically null and void when there was no response or acceptance of the purchase offer from the respondent to GKB. Obviously, there was no contract in writing as required under r. 92(1) of VAEAR.

[18] In the case of *Singham Sulaiman Sdn Bhd v. Mega Palm Sdn Bhd* [2013] 1 LNS 569; [2013] 4 MLRH 592, the High Court held that:

> (2) The plaintiff's claim, that its agency fee was based on verbal arrangement and mutual trust, was clearly untrue. It was the plaintiff's legal obligation as a registered estate agent to ensure that financial obligations and commitments regarding real estate transactions were made in writing. This was as required by r. 92(1) Valuers, Appraisers and Estate Agents Rules 1986. The only reasonable and irresistible inference to be drawn from the plaintiff's failure to express the alleged obligations and commitments in writing was that there never existed at any point in time an estate agency relationship between the plaintiff and the defendant as claimed by the plaintiff. It was extremely unlikely that the plaintiff would not have signed an agency contract if there was indeed such an agency contract entered into by the plaintiff and the defendant.

[19] This court further shares the views of the decision of the Court of Appeal in the case of *Baldah Toyyibah (Prasarana) Kelantan Sdn Bhd v. Dae Hanguru Infra Sdn Bhd & Another Appeal* [2020] 5 CLJ 27; [2020] MLJU 295. The appellate court in *Baldah Toyyibah* (*supra*) said that since the respondent did not execute the LOI, there is no *consensus ad idem* on the appellant's appointment for the sale of the property.

(ii) Whether The Appellant Is The Effective Cause Of Sale Of The Property?

[20] This issue is premised on the facts of the case and it must be sufficiently shown that there is a connection between the appellant's actions and the ultimate transaction. In this regard, the respondent submitted that it is necessary to establish that the rights of property agent to the professional fees does not arise from being a mere agent who has introduced the buyer to the seller as a *causa sine qua non*. The mere act of introducing the parties is not enough to create an efficient cause that ultimately leads to the sale of real estate.

[21] In the Federal Court case of *Chew Teng Cheong & Anor v. Pang Choon Kong* [1983] 2 CLJ 117; [1983] CLJ (Rep) 86, the court held that: A

> [87] Where the agency contract provides that the agent earns his remuneration upon bringing about a certain transaction, he will be entitled to such remuneration if he is the effective, not necessarily the immediate cause of the transaction being brought about. Whether there is a sufficient connection between his act and the ultimate transaction must be ascertained from the facts of the case. B

[22] It was also decided in *Singham Sulaiman Sdn Bhd* (*supra*) that "… an agent's right to commission does not arise out of the mere fact that the agent has introduced a purchaser as being a *causa sine qua non*. The plaintiff must C go further and show that the introduction was an efficient cause in bringing about the sale of the property, *ie* the *causa causans* for the sale of the property …". (The case of *Tribe v. Taylor* [1876] 1 CPD and *Miller v. Radford* [1903] 19 TLR 575 referred).

[23] Therefore, it must be shown from the facts that there was a sufficient D connection between the appellant's act and the ultimate sale transaction. "The effectiveness of the agent's work is a matter of inference from the evidence" (*Sushames v. Cumming* [1962] NZLR 920 at p. 925 per McGregor J).

[24] The appellant must show that some act of the appellant was the *causa* E *causans* of the transaction or was an effective cause of the sale. This means that the appellant's efforts to market the property must have operated to produce a ready and willing buyer for the property.

[25] Based on the evidence, this court finds that the appellant had shown F sufficient connection between their conduct and the ultimate sale transaction.

[26] First, it was undisputed that the respondent attended the meetings proposed and/or arranged by the appellant to "connect" the respondent and the potential buyer pertaining to the sale of the property.

[27] Second, it was not disputed that after a site visit on 16 January 2021, G the respondent met with the potential buyer for discussions regarding the property (although the appellant was not allowed to participate in the discussion).

[28] Third, it appears that although the appellant requested in vain to H attend the meeting on 18 January 2021 for further discussion on the sale of the property with the potential buyer, the respondent continued to provide feedback between 20 January 2021 to 22 March 2021 when the appellant made follow up inquiries on the status of the sale of the property.

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[29] As regards the issue of the buyer was Dynacare and not GKB, the court finds that the evidence of SD1 and SD2 which transpired during the cross-examinations speaks volume on the respondent's case. The respondent's witnesses had in fact confirmed and admitted that they themselves did not differentiate between GKB and Dynacare. It was also agreed by SD1 and SD2 that GKB and Dynacare were both represented by Mr Phoon Hee Yau who is the General Manager of GKB and also the agreed Director of Dynacare.

LYF	Setuju dengan saya Encik Phoon Hee Yau merupakan pegawai utama daripada pihak pembeli yang kamu telah berurusan dari permulaan sehingga perjanjian jual beli dikendalikan oleh jabatan undang-undang?	
SD1	Ya benar.	
LYF	Setuju Encik Phoon Hee Yau yang kamu ingat tadi dari permulaan merupakan wakil George Kent dan pada akhirnya merupakan wakil Dynacare, orang yang sama, setuju?	
SD1	Setuju.	

source:PDF29/Jilid 3

LYF	Saya cadangkan kepada Encik Megat bahawa Defendan sebenarnya tidak pernah membangkitkan sebarang quiry kenapa terdapat perbezaan antara nama George Kent dan/atau Dynacare, setuju atau tidak?	
SD2	Setuju.	
LYF	Setuju ah, dan saya cadangkan kepada Encik Megat, alasan kenapa Defendan tidak bangkitkan sbarang quiry di antara George Kent dan Dynacare sebab Defendan berpengetahuan bahawa George Kent dan Dynacare adalah daripada pembeli, kumpulan pembeli yang sama dan saling berkaitan?	
SD2	Setuju.	

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[30] The purchase of the property was finalised through the sale and purchase agreement dated 29 March 2021 to Dynacare for RM27,300,000. The appellant contended that the appellant was the effective cause of sale of the property that an offer to purchase the property was made by Dynacare on 20 January 2021 based on this timeline:

(i) 12 days after a site visit on 8 January 2021;

(ii) one week after the virtual meeting on 13 January 2021

(iii) six days after the appellant had informed the respondent that potential buyer is still interested in the purchase of the said property on 14 January 2021;

(iv) four days after a site visit meeting arranged by the appellant for the respondent and the potential buyer to view the property on 16 January 2021;

(v) two days after the meeting between the respondent and the potential buyer on 18 January 2021 (of which the appellant was not allowed to join).

[31] Premising on the facts of this case, this court therefore finds that there was a sufficient connection between the appellant's conduct and the ultimate sale transaction. There was also continuation within a close proximity of time, *ie*, from the moment when the potential buyer was brought by the appellant to the respondent, until the day when an offer was made to purchase the property which subsequently culminated in the successful sale of the property.

[32] The appellant has thus succeeded in proving that some act of the appellant was the cause causans of the transaction and that their efforts had been the effective cause of the sale. Accordingly, the court finds that the appellant is the effective cause in bringing about the sale of the property.

Intervention Of The Court

[33] In these premises, the court finds that there was insufficient judicial appreciation of the evidence by the Sessions Court which warrants the intervention of this court (see *Ng Hoo Kui & Anor v. Wendy Tan Lee Peng, Administrator Of The Estates Of Tan Ewe Kwang, Deceased & Ors* [2020] 10 CLJ 1, Federal Court; and *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309; [2005] 2 MLJ 1, Federal Court).

Quantum Meruit

[34] In considering the matter, this court decided, at the outset, that there was no express contract that dealt with the appellant's purported entitlement to commission. However, as the appellant's services were the effective cause of the transaction, the appellant is entitled for payment of the services rendered based on '*quantum meruit*'.

[35] *Quantum meruit* is provided under s. 71 of the Contracts Act 1950 which states:

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[36] As such, a sum that will provide the appellant with the value of what the appellant had done for the respondent would be appropriate and this is usually calculated by reference to the value of the services (see JW Carter, *Ineffective Transactions, in PD Finn, ed, Essays on Restitution* (North Ryde, NSW The Law Book company Limited 1990, 206 at pp. 235 to 240)).

[37] In the case of *Syarikat Binaan Utara Jaya v. Koperasi Serbaguna Sungai Glugor Bhd* [2009] 1 CLJ 786; [2008] 2 MLRA 809, the court held that:

> [43] The term "*quantum meruit*" is a Latin term. In Latin, it **means "how much he desires"**. It is a common terminology in an action of general assumption **to recover payment for the value of labour and services.**
>
> (emphasis added)

[38] Further at para. 40, the court held that:

> (e) when work is done under a void contract (this envisages the situation where a contractor carries out work or renders services under a contract subsequently found to be void, the contractor is entitled to a *quantum meruit* for the work or services (*Craven-Ellis v. Canons, Limited* [1936] 2 KB 403, CA; and *Rover International Ltd and Others v. Cannon Film Sales Ltd* [1989] 1 WLR 912 CA)).

Decision

[39] Based on the aforesaid reasons, and after careful scrutiny and judicious consideration of all the evidence before this court, including the written and oral submissions of both parties, the present court finds that the appellant is the effective cause of sale of the property.

[40] However, since there was no express contract to ascertain to the professional fees, thus, based on the court's inherent jurisdiction and for the purpose of justice, the court allows payment for services rendered by way of '*quantum meruit*' (what he deserves).

[41] The appeal is hence partly allowed with cost of RM10,000 subject to allocatur fee.